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11 Pichette, and Nominal Party Google Inc.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION
16

17 In re GOOGLE INC. SHAREHOLDER)
DERIVATIVE LITIGATION)

18)
19 This Document Relates To:)

20 ALL ACTIONS)
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Master File No. CV-11-04248-PJH

DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS VERIFIED
CONSOLIDATED SHAREHOLDER
DERIVATIVE COMPLAINT

DATE: March 21, 2012
TIME: 9:00 am
JUDGE: Hon. Phyllis J. Hamilton

1 Nominal Party Google Inc. (“Google” or the “Company”) and Individual Defendants Larry
2 Page, Sergey Brin, Eric E. Schmidt, L. John Doerr, John L. Hennessy, Paul S. Otellini, K. Ram
3 Shriram, Shirley M. Tilghman, Nikesh Arora, and Patrick Pichette (collectively “defendants”)
4 hereby request that this Court consider documents incorporated by reference in and integral to the
5 Verified Consolidated Shareholder Derivative Complaint (“Complaint” or “CC”) and judicially
6 notice pursuant to Rule 201 of the Federal Rules of Evidence certain documents submitted in
7 support of the Defendants’ Motion to Dismiss the Complaint.

8 DISCUSSION

9 **I. The Court Should Consider Documents Incorporated By Reference And Integral** 10 **To Plaintiffs’ Claims**

11 Under the incorporation by reference doctrine, district courts may “consider documents
12 ‘whose contents are alleged in a complaint and whose authenticity no party questions, but which
13 are not physically attached to the [plaintiff’s] pleading.’” *In re Silicon Graphics Inc. Sec. Litig.*,
14 183 F.3d 970, 986 (9th Cir. 1999) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994),
15 *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)).
16 This doctrine has been extended “to situations in which the plaintiff’s claim depends on the
17 contents of a document, the defendant attaches the document to its motion to dismiss, and the
18 parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly
19 allege the contents of that document in the complaint.” *Knievel v. ESPN*, 393 F.3d 1068, 1076,
20 (9th Cir. 2005); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998) (holding that district
21 court had properly considered documents attached to a motion to dismiss that described the terms
22 of plaintiff’s group health insurance plan where membership in the plan was alleged and claims
23 depended on the conditions described in the documents), *abrogated by statute on other grounds*,
24 *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006). This Court has
25 recognized that in the context of a motion to dismiss a shareholder derivative suit, the “Court may
26 consider documents referenced extensively in the complaint and documents that form the basis of a
27 plaintiff’s claim.” *In re VeriSign, Inc., Deriv. Litig.*, 531 F. Supp. 2d 1173, 1187 (N.D. Cal. 2007)

1 (citing, *inter alia*, *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003)).

2 Accordingly, defendants request that the Court consider on the defendants' Motion to
3 Dismiss the following documents, cited to or necessarily relied on in the Complaint:

- 4 1. Google's Non-Prosecution Agreement with the Department of Justice dated August
5 19, 2011 (referenced in the Complaint, *e.g.*, ¶¶9, 72), Ex. A to the Declaration of
6 Cheryl W. Fount ("Fount Dec.").
- 7 2. Excerpts from Google's proxy statement, Schedule 14A, filed with the SEC on March
8 31, 2006 (*see* Complaint ¶¶21-30), Ex. B to Fount Dec.
- 9 3. Excerpts from Google's proxy statement, Schedule 14A, filed with the SEC on April
10 4, 2007 (*see* Complaint ¶¶21-30, 106(a)), Ex. C to Fount Dec.
- 11 4. Excerpts from Google's proxy statement, Schedule 14A, filed with the SEC on March
12 25, 2008 (*see* Complaint ¶¶21-30, 106(a)), Ex. D to Fount Dec.
- 13 5. Excerpts from Google's proxy statement, Schedule 14A, filed with the SEC on March
14 24, 2009 (*see* Complaint ¶¶21-30, 106(a)), Ex. E to Fount Dec.
- 15 6. Excerpts from Google's proxy statement, Schedule 14A, filed with the SEC on March
16 29, 2010 (*see* Complaint ¶¶21-30, 106(a)), Ex. F to Fount Dec.
- 17 7. Excerpts from Google's proxy statement, Schedule 14A, filed with the SEC on April
18 20, 2011 (*see* Complaint ¶¶21-30), Ex. G to Fount Dec.

19 **II. The Court Should Take Judicial Notice of Google's SEC Filings and Certificate of**
20 **Incorporation**

21 Defendants also request that the Court take judicial notice of additional documents under
22 Federal Rules of Evidence 201. A judicially noticeable fact is one that is not subject to reasonable
23 dispute in that "it is either (1) generally known within the territorial jurisdiction of the trial court, or
24 (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be
25 questioned." FED. R. EVID. 201(b). Judicial notice is "mandatory" if "requested by a party and
26 supplied with the necessary information." FED. R. EVID. 201(d). The Court may take judicial
27 notice of matters of public record without converting a motion to dismiss a shareholder derivative
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1 into a motion for summary judgment. *Baca ex rel. Insight Enters., Inc. v. Crown*, No. 09-1283-
2 PHX, 2010 WL 2812697, at *2 (D. Ariz. Jan. 8, 2010) (citing, *inter alia*, *MGIC Indem. Corp. v.*
3 *Weisman*, 803 F. 2d 500, 504 (9th Cir. 1986)); *Jones ex rel. CSK Auto Corp. v. Jenkins*, 503 F.
4 Supp. 2d 1325, 1339 n.6 (D. Ariz. 2007) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89
5 (9th Cir. 2001)); *In re Bidz.com, Inc. Deriv. Litig.*, 773 F. Supp. 2d 844, 849 n.2 (C.D. Cal. 2011).

6 Judicial notice may be taken of SEC filings, certificates of incorporation, and press
7 releases. See *In re Computer Sciences Corp. Deriv. Litig.*, No. 06-05288-MRP, 2007 WL
8 1321715, at *7 n.5 (C.D. Cal. Mar. 26, 2007) (taking judicial notice of proxy statement, Form 8-K,
9 SEC Form 4, articles of incorporation), *aff'd sub nom. Laborers Int'l Union of N. Am. v. Bailey*,
10 310 Fed. Appx. 128 (9th Cir. 2009); *Jones*, 503 F. Supp. 2d at 1339 n.6 (taking judicial notice of
11 proxy statement); *Baca*, 2010 WL 2812697, at *2, *3 (taking judicial notice of Form 10-K, press
12 releases, and certificate of incorporation of a Delaware corporation); *Bidz.com.*, 773 F. Supp. 2d at
13 855, 859 (taking judicial notice of Form 10-K, certificate of incorporation).

14 Accordingly, defendants request that the Court take judicial notice of the following
15 documents:

16 8. Excerpts from Google's Form 10-K for the year ended December 31, 2004, filed
17 March 30, 2005, Ex. H to Fount Dec.

18 9. Excerpts from Google's Form 10-K for the year ended December 31, 2006, filed
19 March 1, 2007, Ex. I to Fount Dec.

20 10. Excerpts from Google's Form 10-K for the year ended December 31, 2009, filed on
21 February 12, 2010, Ex. J to Fount Dec.

22 11. Excerpts from Google's Third Amended and Restated Certificate of Incorporation as
23 filed August 24, 2004, attached as Ex. 3.01 to Google's Form 10-K for the year ended
24 December 31, 2010, filed with the SEC on February 11, 2011, Ex. K to Fount Dec.

25 WHEREFORE, the defendants hereby request that the Court take judicial notice of the
26 above-referenced documents in connection with the defendants' Motion to Dismiss the Complaint.
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1 Dated: December 14, 2011

Respectfully submitted,

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6 By: /s/ Boris Feldman

Boris Feldman

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8 Hennessy, Paul S. Otellini, K. Ram Shriram,

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9 Pichette, and Nominal Party Google Inc.

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